Dunggon Jaya Sdn Bhd v Aeropod Sdn Bhd & Anor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02(NCVC)(A)-1146–06 OF 2017 AND S-02(IM)(NCVC)-1147–06 OF 2017

B

ABDUL RAHMAN SEBLI, KAMARDIN HASHIM, KAMALUDIN MD SAID JJCA

17 MAY 2019

C

Contract — Guarantee — Banker's guarantee — Unconscionability — Whether strong prima facie case of unconscionable conduct on part of beneficiary under bank guarantee was sufficient ground to injunct it from calling on the guarantee or receiving any payment under it — Whether test was not whether allegations of unconscionable conduct had been proven but whether there was strong arguable case for an injunction to be granted given beneficiary's conduct — Whether High Court's failure to consider guidelines set out in Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 and in deciding to refuse injunctive relief a serious misdirection by way of non-direction that warranted appellate intervention

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The first respondent ('R1') appointed the appellant to carry out certain construction works. In keeping with the construction contract between the parties, the appellant took out a bank guarantee ('the guarantee'), issued by the second respondent ('R2'), favouring R1. Under the guarantee, R2 undertook to unconditionally pay R1 on demand the sum of RM4,031,979.34 if the appellant failed to perform the contract or committed any breach of it. Despite giving the appellant an extension of time until February 2016 to complete the construction works, R1 unilaterally terminated the contract in October 2015 and made a call on the guarantee. The appellant immediately filed a suit and obtained an ex parte injunction preventing R1 from calling on the guarantee. R1 countered by applying for a stay of all proceedings under s 10 of the Arbitration Act 2005 ('the AA') pending arbitration. The High Court stayed the suit without affecting the injunction proceedings. The Court subsequently granted an injunction after hearing both parties but on R1's appeal, it was set aside by the Court of Appeal ('the COA') on the ground the appellant had not cited s 11 of the AA in its application and had also not used the proper procedure. The COA allowed the appellant liberty to re-file a proper injunction application, which it promptly did. Based on the application, the court again granted an ex parte injunction which was extended ad interim for four months and then disallowed. In its instant appeal against the decision, the appellant argued that the High Court's dissolution of the injunction was wrong because R1 had acted unconscionably and had to be restrained from calling on the

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guarantee. The appellant listed out a series of acts constituting unconscionable conduct on R1's part, prime of which was terminating the contract after giving the appellant an extension of time to complete the works. In reply, R1 argued that the guarantee was unconditional and payable on demand independent of any underlying dispute between the contracting parties. R1 said the allegations of unconscionable conduct on its part were unproven and if it had committed any breach of the contract the proper course of action was for the appellant to make a claim for damages in the arbitration proceedings.

Held, allowing the appeal and setting aside the High Court's decision:

(1) The High Court had exercised its discretion wrongly in refusing to grant the injunction sought. Although the bank guarantee was an unconditional, on-demand performance bond, R1 was guilty of unconscionable conduct, which vitiated the validity of the demand. On the facts, it was clear that R1 had engineered a situation to unfairly avoid paying monies that were due and owing to the appellant. The instances of unconscionable conduct taken cumulatively — in particular, R1's act of giving an extension of time until February 2016, yet terminating the contract four months before that date — amounted to conduct of such a degree that it pricked the conscience of a reasonable and sensible man. On the facts, R1 ought to be restrained from calling on, or receiving any monies under, the bank guarantee before any decision was made in the arbitration proceedings on the question of whether the termination of the contract was wrongful or otherwise (see paras 25–27 & 33).

(2) The appellant had made out a strong prima facie case of unconscionability and unfairness against R1 for calling on the bank guarantee. Pertinently, the affidavits filed by R1 did not deny or explain away the additional works that were carried out by the appellant, the delay in certification, the delay/failure to make full payment to the appellant or the claim that R1 was holding RM3,798,100.59 as retention sum. The facts and circumstances surrounding R1's demand on the guarantee were so lacking in good faith that taken as a whole, they amounted to unconscionable conduct warranting the court's intervention by way of injunction to avoid injustice. On the face of it, the demand on the guarantee was premature, invalid and of no effect. Although the allegations against R1 were not proven, the test was not whether or not they were proven but whether sufficient evidence had been placed before the court to enable it to be satisfied, not necessarily beyond reasonable doubt, that a case of unconscionability had been established to an extent sufficient for the court to be minded to order the injunction sought (see paras 29–32).

(3) The balance of convenience favoured the grant of an injunction. R1 would not be prejudiced because the monies were safe with R2 and R1

was already withholding a large sum of money (more than RM4m) which was due to the appellant. Damages were not an adequate remedy as the appellant, having been starved of funds, would be crippled if the bank guarantee was released and R2 went after the appellant for reimbursement (see paras 34–35).

(4) Nowhere in the High Court's grounds of judgment was reference made to the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 nor did the grounds indicate that the judge was mindful of the steps he was required to take along the lines set out in that case. Importantly, the judge did not appear to have considered whether, on the totality of the facts before him, a bona fide serious issue to be tried had been disclosed. The judge's failure to direct his mind to *Keet Gerald* or to the principles laid down in that case was a serious misdirection by way of non-direction that warranted intervention by this court (see paras 37–38).

(5) Separate applications required separate affidavits in opposition or in reply. R1 did not file any affidavit to oppose the appellant's application for the inter partes injunction application. At the hearing, the appellant raised a preliminary objection to R1 re-using the affidavit it had filed in support of its earlier application to strike out the appellant's ex parte interim injunction but the High Court judge overruled the objection and allowed the affidavit to be used. This was wrong. R1's failure to file any affidavit to oppose the inter partes injunction application must be taken to mean that it did not wish to contradict any of the averments made by the appellant in its affidavit in support (see paras 41 & 44).

(6) R1's contention that the appellant was barred from re-filing the injunction application on the ground of res judicata (since it had previously argued for and obtained the same relief) had no merit. The re-filing of the application was on the authority of the COA's order wherein the appellant was given liberty to file the application afresh. In any case, R1's failure to appeal against that order meant it had accepted the decision as final and it could not now raise res judicata as an issue. There was also no merit to R1's contention that the appellant had not shown how the injunction it sought could support, assist, aid and/or facilitate the pending arbitral proceedings between itself and R1 (see paras 45–46, 48 & 50).

[Bahasa Malaysia summary

Responden pertama ('R1') melantik perayu untuk menjalankan kerja pembinaan tertentu. Selaras dengan kontrak pembinaan di antara pihak-pihak, perayu mengambil jaminan bank ('jaminan'), yang dikeluarkan oleh responden kedua ('R2'), memihak kepada R1. Di bawah jaminan tersebut, R2 telah menjamin untuk membayar tanpa syarat kepada R1 atas

permintaan sejumlah RM4,031,979.34 jika perayu gagal melaksanakan kontrak atau melakukan pelanggaran terhadapnya. Walaupun memberi perayu masa lanjutan sehingga Februari 2016 untuk menyelesaikan kerja-kerja pembinaan, R1 secara sebelah pihak menamatkan kontrak pada Oktober 2015 dan membuat panggilan ke atas jaminan. Perayu dengan serta-merta memfailkan saman dan memperoleh injunksi ex parte yang menghalang R1 daripada memanggil jaminan. R1 membalas dengan memohon untuk menangguhkan semua prosiding di bawah s 10 Akta Timbang Tara 2005 ('Akta') menunggu timbang tara. Mahkamah Tinggi menangguhkan saman tersebut tanpa menjejaskan prosiding injunksi. Mahkamah kemudiannya memberikan injunksi selepas mendengar kedua-dua pihak tetapi dengan rayuan R1, ia telah diketepikan oleh Mahkamah Rayuan ('MR') atas alasan bahawa perayu tidak menyebut s 11 Akta dalam permohonannya dan juga tidak menggunakan prosedur yang betul. MR membenarkan kebebasan perayu untuk memfail semula permohonan injunksi yang sepatutnya, yang dilakukan dengan segera. Berdasarkan permohonan tersebut, mahkamah sekali lagi memberikan injunksi ex parte yang dilanjutkan ad interim selama empat bulan dan kemudian tidak dibenarkan. Dalam rayuannya terhadap keputusan tersebut, perayu berpendapat bahawa pembubaran injunksi oleh Mahkamah Tinggi tersebut adalah salah kerana R1 telah bertindak tidak berpatutan dan perlu dihalang daripada memanggil jaminan tersebut. Perayu menyenaraikan satu siri perbuatan yang membentuk kelakuan tidak berpatutan pada bahagian R1, yang terutamanya telah menamatkan kontrak selepas memberi perayu masa pelanjutan untuk menyelesaikan kerja-kerja. Sebagai balasan, R1 berhujah bahawa jaminan tersebut tidak bersyarat dan dibayar atas permintaan bebas daripada sebarang pertikaian antara pihak-pihak yang berkontrak. R1 berkata tuduhan tindakan tidak berpatutan di pihaknya tidak dibuktikan dan jika ia telah melakukan apa-apa pelanggaran kontrak tindakan yang wajar adalah untuk perayu membuat tuntutan ganti rugi dalam prosiding timbang tara.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mahkamah Tinggi telah menjalankan budi bicaranya dengan salah dengan enggan memberikan injunksi yang dipohon. Walaupun jaminan bank adalah bon prestasi yang tidak bersyarat, atas permintaan, R1 bersalah atas tindakan tidak berpatutan, yang membatalkan kesahihan permintaan. Pada fakta, jelas bahawa R1 telah merekabentuk keadaan yang tidak adil untuk mengelakkan membayar wang yang terhutang kepada perayu. Contoh-contoh tindakan tidak berpatutan yang diambil secara kumulatif — khususnya, tindakan R1 memberi lanjutan masa sehingga Februari 2016, tetapi menamatkan kontrak empat bulan sebelum tarikh tersebut — berjumlah kepada tindakan sedemikian sehingga mengganggu hati nurani mereka yang berfikiran waras dan

wajar. Berdasarkan fakta, R1 harus dihalang daripada memanggil, atau menerima apa-apa wang di bawah, jaminan bank sebelum keputusan dibuat dalam prosiding timbang tara mengenai persoalan sama ada penamatan kontrak tersebut salah atau tidak (lihat perenggan 25–27 & 33).

(2) Perayu telah membuktikan kes prima facie yang kukuh terhadap ketidakwajaran dan ketidakadilan terhadap R1 kerana memanggil jaminan bank. Pertamanya, afidavit yang difailkan oleh R1 tidak menafikan atau menjelaskan kerja-kerja tambahan yang dilakukan oleh perayu, penangguhan dalam perakuan, penangguhan/kegagalan untuk membuat pembayaran penuh kepada perayu atau tuntutan bahawa R1 telah memegang RM3,798,100.59 sebagai jumlah tahanan. Fakta dan keadaan sekitar permintaan R1 tentang jaminan tersebut adalah tidak berniat baik yang diambil secara keseluruhannya, mereka berjumlah kepada tindakan tidak berpatutan yang menjamin campur tangan mahkamah dengan cara injunksi untuk mengelakkan ketidakadilan. Kelihatannya, tuntutan mengenai jaminan tersebut adalah pramatang, tidak sah dan tiada kesan. Walaupun tuduhan terhadap R1 tidak dibuktikan, ujian tersebut adalah bukan sama ada atau tidak mereka terbukti tetapi sama ada keterangan yang mencukupi telah diletakkan di hadapan mahkamah untuk membolehkannya dipenuhi, tidak semestinya melebihi keraguan munasabah, bahawa suatu kes ketidakwajaran telah dibuktikan setakat yang mencukupi bagi mahkamah untuk berfikiran untuk memerintahkan perintah injunksi tersebut (lihat perenggan 29–32).

(3) Keseimbangan kesenangan menyebelahi pemberian injunksi. R1 tidak akan diprejudis kerana wang tersebut selamat dengan R2 dan R1 telah memegang sejumlah besar wang (lebih daripada RM4 juta) yang terhutang kepada perayu. Ganti rugi bukanlah satu remedi yang mencukupi kerana perayu, yang telah kehilangan dana, akan menjadi lumpuh jika jaminan bank dikeluarkan dan R2 mengejar perayu untuk pembayaran semula (lihat perenggan 34–35).

(4) Tiada dalam alasan penghakiman Mahkamah Tinggi merujuk terhadap kes *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 juga tiada alasan menunjukkan bahawa hakim sedar tentang langkah-langkah yang perlu diambil dalam kes tersebut. Yang penting, hakim nampaknya tidak mempertimbangkan sama ada, pada keseluruhan fakta-fakta yang ada di hadapannya, isu bona fide serius yang perlu dibicarakan telah didedahkan. Kegagalan hakim untuk mengarahkan mindanya ke *Keet Gerald* atau dengan prinsip-prinsip yang ditetapkan dalam kes tersebut adalah salah arah serius iaitu ketidakarahan yang mewajarkan campur tangan mahkamah ini (lihat perenggan 37–38).

(5) Permohonan berasingan memerlukan afidavit berasingan dalam menentang atau dalam jawapan. R1 tidak memfailkan afidavit untuk menentang permohonan perayu untuk permohonan injunksi inter partes. Pada pendengaran tersebut, perayu menimbulkan bantahan awal kepada R1 menggunakan semula afidavit yang telah difailkan untuk menyokong permohonan terdahulu untuk membatalkan injunksi sementara ex parte perayu tetapi hakim Mahkamah Tinggi menolak bantahan tersebut dan membenarkan afidavit tersebut untuk digunakan. Ini adalah salah. Kegagalan R1 untuk memfailkan afidavit untuk menentang permohonan injunksi inter partes mesti diambil untuk bermaksud bahawa ia tidak ingin bercanggah dengan mana-mana pandangan yang dibuat oleh perayu dalam affidavit sokongannya (lihat perenggan 41 & 44).

(6) Pertikaian R1 bahawa perayu telah dihalang daripada memfailkan semula permohonan injunksi atas dasar res judicata (oleh kerana ia telah diperdebatkan dan mendapat relif yang sama) tidak mempunyai merit. Pemfailan semula permohonan tersebut adalah dengan autoriti perintah MR yang mana perayu diberi kebebasan untuk memfailkan permohonan tersebut sekali lagi. Walau apa pun, kegagalan R1 untuk merayu terhadap perintah tersebut bermakna ia telah menerima keputusan sebagai muktamad dan kini tidak dapat membangkitkan res judicata sebagai isu. Juga tidak terdapat merit terhadap pertikaian R1 bahawa perayu tidak menunjukkan bagaimana injunksi yang dipohonnya boleh menyokong, menolong, membantu dan/atau memudahkan prosiding timbang tara yang belum selesai antara dirinya dan R1 (lihat perenggan 45–46, 48 & 50).]

Notes

For cases on banker's guarantee, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 5688–5695.

Cases referred to

Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd [2015] MLJU 953; [2015] 5 CLJ 652, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2008] 6 MLJ 636; [2009] 2 CLJ 1; [2009] 1 LNS 673, FC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Kejuruteraan Bintai Kidenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442, FC (refd)

Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2018] Supp MLJ 33; [2014] 9 CLJ 1064, FC (refd)

Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd) A
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)
Z Ltd v A and others [1982] 1 All ER 556, CA (refd)

Legislation referred to B

Arbitration Act 2005 ss 10, 11
Rules of Court 2012 O 28 r 3C, O 29

Appeal from: Originating Summons No BKI-24NCVC–12/1 of 2017 (High Court, Kota Kinabalu) C

Rakhbir Singh (Rakhbir Singh & Co) for the appellant.
Lau Cheung Hoon (Jayasuriya Kah & Co) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court): D

[1] These two appeals arose from the decision of the High Court at Kota Kinabalu which:

(a) disallowed the appellant's application by way of originating summons to restrain the first respondent from calling on the bank guarantee of RM4,031,979.34 issued by the second respondent until the appellant's claim is heard and disposed of by arbitration; E

(b) disallowed the appellant's preliminary objection against the use of the first respondent's affidavit in reply as an opposing affidavit in the said application; and F

(c) allowing the first respondent's notice of application to set aside the ex parte originating order dated 20 January 2017 granted to the appellant.

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[2] Having heard arguments by both sides, we allowed the appellant's appeals and these are our grounds.

[3] The following facts are not in dispute. The first respondent was appointed by the appellant to carry out construction works for the Main Building Works for Package 1: Basement Level, Level 1, 2, Block C and D pursuant to a letter of acceptance dated 29 November 2013 under Contract Reference No ASAB-BLDG-C029/13. H

[4] On or about 4 February 2014, the appellant and the first respondent entered into a formal contract adopting the PAM Form of Contract 2006 (Without Quantities) with modifications. I

[5] On 19 November 2014, the parties entered into a Bank Guarantee

No BGINM001592 for the sum of RM4,031,979.34. The bank guarantee is couched in the following language:

> If the Contractor shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder then the Guarantor shall within Seven (7) banking days upon receipt of written demand pay to the Principal up to and not exceeding the sum of Ringgit Malaysia Four Million Thirty One Thousand Nine Hundred Seventy Nine and Sen Thirty Four only (RM4,031,979.34) representing 5% of the Contract Value notwithstanding any contestation or protest by the Contractor or by the Guarantor or by any other third party.

[6] On 12 October 2015, the first respondent unilaterally terminated the contract on the ground that the appellant failed to proceed regularly and diligently with the construction works even though the appellant was given until February 2016 to complete the works. The bank guarantee was called on by first respondent on the same day.

[7] On 21 October 2015, the appellant filed a writ of summons for an order that the first respondent be restrained from calling on the bank guarantee, and on even date applied for an ex parte injunction. The first respondent countered by filing an application to stay all proceedings under s 10 of the Arbitration Act 2005 ('the Arbitration Act') pending arbitration.

[8] On 22 October 2015 the ex parte injunction applied for by the appellant was granted by the High Court.

[9] On 22 February 2016 the court granted a stay of proceedings under s 10 of the Arbitration Act 2005 of the remaining proceedings under the first suit but not the injunction application.

[10] On 25 May 2016, the inter parte injunction application was heard and granted by Ravinthran N Paramaguru J. The first respondent appealed against the decision.

[11] On 19 January 2017, this court allowed the first respondent's appeal and set aside the injunction on the principal ground that the appellant in its injunction application failed to cite s 11 of the Arbitration Act in its intitulement and also failed to go by the originating summons procedure. This court however gave the appellant the liberty to re-file the injunction application by the originating summons procedure.

[12] The following day, ie on 20 January 2017, the appellant re-filed the injunction application by the proper mode and citing s 11 of the Arbitration Act in its intitulement. The High Court granted the ex parte injunction on the

same date which was extended as an ad interim injunction until 12 May 2017 when the said application was disallowed. The court however granted an Erinford injunction in favour of the appellant pending disposal of the present appeal.

[13] The appellant's cause of action against the first respondent was for:

(a) breach of the PAM 2006 construction contract agreement;

(b) wrongful termination of the contract; and

(c) to restrain the first respondent from calling on the bank guarantee on the ground of unconscionability.

[14] As against the second respondent bank, the appellant's cause of action was premised on a separate contract In the bank guarantee itself between the appellant and the second respondent. The contract was not under the Arbitration Act and the second respondent was not a party to the arbitration proceedings between the appellant and the first respondent.

[15] It was pointed out that the second respondent did not contest the appellant's application for injunction and had indicated to the court that it would abide by any order granted by the court. The second respondent was not represented by counsel at the hearing of these appeals.

[16] The main thrust of the appellant's argument was that the first respondent had acted unconscionably in calling on the bank guarantee and that under the express terms of the bank guarantee, the bank guarantee could only be released by the second respondent bank after the adjudication had decided that the appellant was in breach of the contract.

[17] The first respondent's argument on the other hand was that the bank guarantee is unconditional and unqualified, citing *Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2008] 6 MLJ 636; [2009] 2 CLJ 1; [2009] 1 LNS 673 where the Federal Court held:

> [13] The clause 'notwithstanding any contestation or protest by the contractor' in the third question shows clearly that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The contractor's remedy is to sue in damages. The implication of such clause is that payment must be made upon receipt of a valid demand. This principle can be seen in the case of *Kerajaan Malaysia v South East Asia Insurance Bhd* [2000] 5 MLJ 265 where it was held that:
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> > Paragraph 1 is so drafted that the guarantor shall become liable merely when the demand is made by the government notwithstanding any contestation or protest by the contractor or by the guarantor or by any third party ... Likewise, in the

present case, the words 'notwithstanding any contestation or protest by the contractor or by ourselves or by any third party' in para 1 above, do not alter the fact that the money is payable on a written demand under and pursuant to the said insurance guarantee. Therefore, on its true construction this insurance guarantee is an on demand performance bond.

[18] Reliance was also placed on another Federal Court case, *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1 which held that a bank guarantee is separate and independent of the underlying contract between the disputing parties and the contract between the account party and the bank.

[19] The sole question of law for the Federal Court's determination in that case was:

> Whether 'unconscionable conduct' on the part of a beneficiary of a bank guarantee or a performance bond is a distinct ground, apart from 'fraud', that entitles the Court to restrain the beneficiary from calling on or demanding and receiving monies under the bank guarantee or performance bond.

[20] Whether unconscionability applies in a particular case would depend largely on the material facts. The following propositions by the Court of Appeal (from which the Federal Court case emanated) were endorsed by *Sumatec*:

> As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the Respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case. In other words, the Respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the Appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such a degree such as to prick the conscience of a reasonable and sensible man.

[21] The Federal Court also cited with approval another decision of this court in *Kejuruteraan Bintai Kidenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 and went on to say:

> We also agree with these other holdings of the Court of Appeal:

(i) In my view, consonant with the principle as laid down by my learned brother, unconscionability is a doctrine which allows courts to deny enforcement of a contract because of abuses arising out of the contract.

(ii) In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.

(iii) A distinction must be drawn between an injunction/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties).

(iv) All the facts and circumstances surrounding the demands made by the first respondent on both the performance bonds were so lacking in good faith and amounted to unconscionable conduct that it warranted court intervention by way of injunction to avoid injustice. The demands on the bonds were premature, invalid and of no effect.

[22] It was the first respondent's contention that the learned High Court judge did not commit any error of law in dissolving the ex parte interim injunction and to set aside the ex parte originating summons as the appellant failed to prove that the first respondent acted unconscionably in calling on the bank guarantee.

[23] It was argued that the learned judge's finding that the first respondent had not acted unconscionably is not plainly wrong and should not therefore be disturbed, citing *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2018] Supp MLJ 33; [2014] 9 CLJ 1064; *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71.

[24] It was further argued that the allegations of unconscionable conduct by the appellant were unfounded and nothing more than unproven allegations of contractual breaches simpliciter in respect of which the appellant may seek for damages via the upcoming arbitration between the appellant and the first respondent and does not warrant an injunction to restrain the first respondent from calling on the bank guarantee.

[25] Having regard to the principles and the totality of the circumstances, we were inclined to agree with the appellant that the learned judge had exercised his discretion wrongly in refusing to grant the injunction sought. Although the bank guarantee was an unconditional and an on demand performance bond,

A the first respondent was guilty of unconscionable conduct, which vitiates the validity of the demand.

[26] On the facts, it is clear that the first respondent had engineered a situation to unfairly avoid making payment of sums due and owing to the appellant:

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(a) by not certifying and/or not paying and/or delaying payment to the appellant for the additional works and costs incurred;

C (b) by wrongfully deducting the contract sums due to the appellant under the interim certificate thereby complicating and constricting the appellant's cash flow for the purpose of paying the sub-contractors, workers and suppliers working on site;

D (c) by its under certification as evidenced by the appellant's letter to Archicentre Sdn Bhd;

(d) the first respondent and/or its consultants in breach of cll 21.3 and 30.6 of the contract failed to issue to the appellant a certificate for the release of 2.5% retention sum from the sum of RM10.4m in respect of works E under section 1, which the first respondent to date has not paid and released to the appellant;

(e) as at the date of the termination, the first respondent retained and controlled the sum of RM3,798,100.59 as retention sum under the contract;

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(f) delayed in certifying progress claim No 22 amounting to RM3,387,520.45 and under certifying it as only RM1,779,850.66. Even this under certified sum of RM1,779,850.66 has not been paid to the appellant;

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(g) the first respondent was quick to starve the appellant of funds to pay its workers by getting its consultant to certify RM1.5m LAD and deducting the same from interim payment certificates Nos 17 and 20 due to the appellant;

H (h) terminating the contract when the delay alleged was a meagre 3.9% to 5% when the appellant still had five more months to complete the works;

(i) the respondent gave an extension of time to the appellant to 15 February 2016, yet it terminated the contract one year earlier on 12 October 2015; I and

(j) the notice of termination dated 12 October 2015 was made in bad faith as it was premised on archicentre's letters dated 17 September 2015, 19 September 2015, 23 September 2015, 29 September 2015 and 5 October 2015 which were not issued and served in strict compliance

with terms of the contract. The proper entity to have issued any such letters ought to be the project architect ie Haoyun Architect and not Archicentre Sdn Bhd.

[27] All these taken cumulatively amounts to conduct of such a degree as to prick the conscience of a reasonable and sensible man, in particular the first respondent's act of giving an extension of time up to 15 February 2016, yet it terminated the contract four months earlier on 12 October 2015.

[28] It was untenable in our view for learned counsel to argue that any difficulty faced by the appellant on site was compensated with ample extension of time and that it had been mutually acknowledged and accepted by both parties that the extension of time granted would have no impact on costs, loss and expenses.

[29] In our view, the facts and circumstances surrounding the demand made by the first respondent on the bank guarantee were so lacking in good faith that taken as a whole they amounted to unconscionable conduct warranting the court's intervention by way of injunction to avoid injustice.

[30] There is in our view a strong element of unfairness on the part of the first respondent in calling on the bank guarantee. On the face of it, the demand for the bank guarantee was premature, invalid and of no effect. Thus, a strong prima facie case of unconscionability had been made out against the first respondent.

[31] It is true, as contended by learned counsel for the first respondent, that these are unproven allegations by the appellant, but the test is not whether they are proven or otherwise but whether sufficient evidence had been placed before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of unconscionability had been established to an extent that is sufficient for the court to be minded to order the injunction sought: *Sumatec*.

[32] It is pertinent to note that in the affidavits filed by the first respondent, it did not deny or explain away the additional works carried out by the appellant, the delay in certification, the delay and/or failure to make full payment to the appellant, and being in possession of the RM3,798,100.59 as retention sum.

[33] We accepted the appellant's argument that in the light of the above facts, the first respondent ought to be restrained from calling on or receiving the bank guarantee before any adjudication or decision is made in the

arbitration proceedings on the question whether the termination of the contract was wrongful or otherwise.

[34] We were of the further view that the balance of convenience favours the grant of an injunction. The first respondent will not be prejudiced because the monies are safe with the second respondent's bank and the first respondent is already withholding a large sum of money, ie more than RM4m due to the appellant.

[35] We did not think damages would be adequate remedy as the appellant, having been starved of fund, would be crippled if the bank guarantee is released and the second respondent bank were to, as in all probability it would, run after the appellant for payment of the RM4m bank guarantee.

[36] That disposes of the appeal but for completeness, we shall deal with the other issues raised by learned counsel for the appellant. First, the learned judge's failure to direct his mind to *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. In that case Gopal Sri Ram JCA (as he then was) in his supporting judgment set out the steps that a judge should take in an application of this nature, in the following terms:

> To summarise, a judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
>
> first, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry; second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would

be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90; [1988] 1 CLJ Rep 435). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[37] Nowhere in his grounds of judgment did the learned judge refer to *Keet Gerald*, nor does the grounds indicate that he was mindful of the steps that he was required to take, along the lines set out by this court in that case.

[38] Importantly, he does not appear to have considered whether on the totality of the facts presented before him, a bona fide serious issue to be tried had been disclosed. The failure by the learned judge to direct his mind to *Keet Gerald* or to the principles laid down in that case is to our mind a serious misdirection by way of non-direction, warranting intervention by this court.

[39] Additionally, the appellant raised the issue that the learned judge was wrong in admitting the first respondent's affidavit in reply affirmed by Chan Tah Seong despite objection by the appellant. The first respondent in the affidavit in reply had deposed as follows:

3. I am advised by the solicitors for the first Respondent and hereby state that I am filing this Affidavit in Reply to the Affidavit in Support affirmed by ELVIS MAIDIN EBRAHIM on 20.1.2017 ...

4. I affirm this Affidavit in Support of the first Respondent's Notice of Application to set aside the ex-parte Order obtained in the Present Application.

[40] Order 28 r 3C of the Rules of Court 2012 provides as follows:

3C Supporting affidavits (O 28 r 3C)

(1) Unless otherwise provided in any written law, where the plaintiff intends to adduce evidence in support of an originating summons, he shall do so

by affidavit and shall file the affidavit or affidavits and serve a copy thereof on every defendant not later than seven days after the service of the originating summons.

(2) Unless otherwise provided in any written law, in the case of an ex parte originating summons, the Appellant shall file a supporting affidavit or affidavits at the time of filing the originating summons.

(3) Where the defendant intends to adduce evidence with reference to the originating summons served on him, *he shall do so by affidavit and the affidavit or affidavits shall be filed and a copy thereof shall be served on the plaintiff not later than twenty-one days after being served with a copy of the affidavit or affidavits by the plaintiff under paragraph (1)*.

(4) Unless otherwise directed by the Court, a party intending to reply to an affidavit served on him shall file his affidavit and serve it on the other party within fourteen days from the date the affidavit he intends to reply was served on him. (Emphasis added.)

[41] It was submitted that the affidavit filed by the first respondent is bad in law, an abuse of the court process and inadmissible for the purpose of the hearing of the appellant's application as it was never affirmed or filed in relation to the originating summons in the present case. The basis for the argument was as follows:

(a) the filing fee for the said affidavit was only paid in relation to the application for the affidavit filed for the first respondent's notice of application to strike out the appellant's ex parte interim injunction;

(b) the said affidavit filed for the first respondent's notice of application to strike out the appellant's ex parte originating summons was re-used to oppose the appellant's inter partes injunction application; and

(c) there was no separate affidavit filed for the inter partes injunction hearing.

[42] The first respondent's answer to the appellant's contention was that the issues and facts for both applications were the same and there was only one outcome and thus the learned judge was correct to find that the appellant would not be prejudiced by the use of the same affidavit that was used in the other application.

[43] It was submitted that the two proceedings were intertwined and the outcome of the first respondent's notice of application would directly reflect the outcome of the appellant's ex parte originating summons. It was further submitted that if the first respondent's notice of application was allowed, it would follow that the ex parte interim injunction would be set aside and similarly if the first respondent was successful in the inter partes hearing, it

would follow that the ex parte interim injunction would also be set aside. A

[44] We were inclined to agree with the appellant. Separate applications require separate affidavits in opposition or in reply. The learned judge was therefore wrong in failing to uphold the appellant's preliminary objection to the admission of the first respondent's affidavit. By not filing any affidavit in opposition to the the appellant's originating summons, it must be taken that the first respondent did not wish to contradict any of the averments made by the appellant in its affidavit in support B

C

[45] The first respondent on its part had raised the issues of res judicata and s 11 of the Arbitration Act ('the Arbitration Act'). First, the issue of res judicata. The complaint was that the appellant's interim relief application had previously been ventilated under the same order, ie O 29 of the Rules of Court 2012 and an interim injunction with modifications was obtained from the High Court on 25 May 2016. According to the first respondent, the present application by the appellant was an abuse of the court process. D

[46] We found no substance to the argument. The appellant should not be prevented from filing the present application for injunction as the re-filing of the application was on the authority of this court's order, ie that the appellant be given the liberty to re-file. In any event, the first respondent did not appeal against the decision, which means it accepted the decision as final. It could not now raise res judicata as an issue. E

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[47] With regard to s 11 of the Arbitration Act, the first respondent relied on *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd* [2015] MLJU 953; [2015] 5 CLJ 652 to support its argument that the injunction application ought not be allowed. In that case, the High Court set out five conditions to warrant the grant of an interim relief pending disposal of the arbitration proceedings. Reliance was placed on headnote (2) of the report as follows: G

> (2) Section 11(1) AA expressly allows judicial 'intervention' in a very limited form — the court may grant interim (and not permanent) relief pending the disposal of arbitration. An applicant for interim relief under s 11(1) AA before the commencement of any arbitral proceedings, should satisfy the court of the five following matters: (a) the applicant must have a cause of action against the party whom interim relief is sought; (b) there must be an 'arbitration agreement' as understood in ss 2(1) and 9(1) to (5) AA; (c) the relief sought must be interim in nature and cannot be permanent in effect; (d) the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings; (e) arbitral proceedings should be commenced within a reasonable time. H I

[48] It was submitted that the appellant failed to show how the injunction it had sought (ie to restrain the first respondent from calling on the bank

guarantee) could support, assist, aid and/or facilitate the pending arbitral proceedings between the appellant and the first respondent.

[49] Learned counsel stressed the point that regardless of whether the amount retained by the bank guarantee remains in the possession of the second respondent or otherwise, the appellant can still proceed with the arbitration and in the event the arbitrator decides against the first respondent, the sum of the bank guarantee would be reinstated to the appellant. As such, there is no real threat of the bank guarantee being dissipated: *Z Ltd v A and others* [1982] 1 All ER 556.

[50] With due respect to learned counsel, we found no merit in the argument. Once a strong prima facie case of unconscionability has been established against the first respondent (the beneficiary), that damages would not be adequate remedy and the balance of convenience favours the grant of an injunction, the appellant would be entitled to the injunction sought.

[51] It was for all the reasons aforesaid that we allowed the appellant's appeal with costs of RM10,000 and set aside the decision of the High Court. The deposit was ordered to be refunded to the appellant.

Appeal allowed, High Court's decision set aside.

Reported by Ashok Kumar